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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 196

LENA VERNACI,

Petitioner.

vs.

STATE OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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LENA VERNACI prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana, entered February 20, 1956 in the matter entitled *State of Louisiana* vs. *Harold F. Mills* and *Lena Vernaci,* being No. 42,663 of the docket of said Court, involving a prosecution under Louisiana Revised Statutes 14:90, an anti-gambling statute.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Louisiana reported in Advance Sheet No. 6 of 86 So. 2d at page 895 and printed in Appendix hereto. The judgment of the Criminal Dis-

trict Court for the Parish of Orleans, State of Louisiana, appearing at page 4 of the transcript of the record filed herewith.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered February 20th, 1956; rehearing was denied March 26th, 1956; all of which appears from certified copy of extract from the minutes of the Supreme Court of Louisiana annexed hereto. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3) since the judgment is repugnant to the Constitution of the United States being in derogation of rights and privileges guaranteed by Amendments V, VI and XIV thereof.

Conceding that there is jurisprudence to the effect that the first ten Amendments to the Constitution of the United States are not operative in State courts, (*Maxwell* v. *Dow*, 176 U. S. 581; 44 L. Ed. 597), we believe with Mr. Justice Harlan (*Huartado* v. *California*, 110 U. S. 568; 28 L. Ed. 246; *Maxwell* v. *Dow*, *supra* at pages 608 and 607 respectively), and many others, that this jurisprudence originally resulted from a forgetfulness, (real or perhaps dictated by seasonable expedience), of the fact that when these Amendments were adopted

> "... the Constitution of each State, with few exceptions, contained and still contains a Bill of Rights, enumerating the rights of life, liberty and property which cannot be impaired by the legislative department."
>
> (Mr. Justice Harlan in the *Huartado* case, *supra.*)

and from the same forgetfulness of the fact that the first ten Amendments to the Constitution merely reaffirmed

> "... that the privileges and immunities enumerated in these Amendments belong to every citizen of the United States" and that "they were universally so regarded prior to the adoption of the Fourteenth Amendment."
>
> (Mr. Justice Harlan in *Maxwell* v. *Dow*, *supra.*)

By no rule of reason can it be thought that an acknowledged pre-existing state of facts could be so abruptly changed by the adoption of an Amendment (XIV) the very language of which confirms the existence of these facts. Times have changed. There can be no cause now for any adroitly specious reasoning continuing the formerly expedient denial of rights and privileges existing, in what is now the United States, since the landing of the Pilgrim Fathers and which rights were vigorously reaffirmed in 1791.

QUESTIONS PRESENTED

Where a State statute employs the disjunctive "or" between phrases defining an offense, is a Bill of Information, drawn thereunder, using the conjunctive "and" and thereby failing specifically to indicate which of the disjoined statutory phrases applied to accused, such an accusation as is violative of the right guaranteed, by Amendment VI of the Constitution of the United States, to all accused:

> ". . . to be informed of the nature and cause of the accusation"

and violative of the "due process of law" rights affirmed by Amendment V and Section 1 of Amendment XIV of said Constitution?

STATUTE INVOLVED

Louisiana Revised Statutes—LSA. R. S. 14:90, reading:

> "Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.
>
> Whoever commits the crime of gambling shall be fined not more than five hundred dollars, or imprisoned for not more than one year, or both."

HOW FEDERAL QUESTION RAISED

On March 1st, 1955 a Bill of Information was filed against petitioner and Harold F. Mills (Tr., p. 8) reading in part as follows:

> "... did commit the crime of gambling as defined by R. S. 14:90 in that each did unlawfully and intentionally conduct and directly assist in the conducting, as a business, at 1229 Simon Bolivar in the City of New Orleans, of a lottery, whereby a person risked the loss of a thing of value in order to realize a profit, contrary to the form of the Statute of the State of Louisiana in such case made and provided and against the peace and dignity of the same."

As the conjunctive "and" was used therein, coupling the words "intentionally conduct" and "directly assist," instead of the disjunctive "or", as appears in the statute, petitioner filed on April 4th, 1955 (Tr., p. 1) an application for a Bill of Particulars (Tr., p. 145) seeking information as to the "nature and cause of the accusation"; namely,—was she accused of

1. *Conducting* a lottery;

   OR

2. Directly *assisting* in the conduct of a lottery.

This application was denied by the District Court June 20th, 1955 and a Bill of Exception No. 1 was seasonably reserved and filed. (Tr., p. 171). Thereupon, petitioner filed a Motion to Quash the Information on June 23rd, 1955, and demurred, on the same date, to the proceedings, all on the same grounds that she had not been specifically informed of the "nature and cause of the accusation." (Tr., pp. 3, 157 and 160). The Motion to Quash and the Demurrer were overruled, Bills of Exception No. 2 and No. 3 were seasonably reserved, (Tr., p. 3) and filed (Tr., pp. 174 and 184).

Petitioner was tried and convicted on June 23rd, 1955, and on July 25th, 1955 filed a Motion for a New Trial (Tr., pp. 5 and 162), reading in part (Tr., p. 164) as follows:

> "That the aforesaid errors are all in contravention of the rights guaranteed to defendant, Lena Vernaci, by the Constitution of the State of Louisiana, particularly Sections 2 and 9 of Article 1 thereof, and in contravention of the rights guaranteed to defendant by the Constitution of the United States of America, particularly Amendments 5 and 6 and Section 1 of Amendment 14 thereof."

The motion for a new trial was overruled, and Bill of Exception No. 6 seasonably reserved (Tr., p. 5) and filed (Tr., pp. 201-202).

On July 28th, 1955, petitioner filed a Motion in Arrest of Judgment (Tr., p. 6) reading in part as follows: (Tr., p. 167)

> "The entire proceedings, Bill of Information, the rulings of the Court complained of and the Trial are in contravention of the rights granted to the defendant, Lena Vernaci, by the Constitution of the State of Louisiana, particularly Sections 2 and 9 of Article 1 thereof, and in contravention of the rights granted to defendant by the Constitution of the United States of America, particularly Amendments 5 and 6 and Section 1 of Amendment 14 thereof, all as set forth in the Motion for a New Trial on file herein and made part of this Motion, which was denied on July 25th, 1955."

This motion was overruled, Bill of Exception No. 7 seasonably reserved (Tr., p. 6) and filed (Tr., pp. 220-21).

On August 15th, 1955, petitioner was sentenced (Tr., p. 7) and thereupon filed a motion for a suspensive appeal (Tr., p. 169) which was granted. (Tr., p. 7).

The appeal was argued before the Supreme Court of Louisiana and on February 20th, 1956 the judgment of the Criminal District Court was affirmed; a rehearing was denied March 26th, 1956.

STATEMENT OF CASE

As facts of the case pertinent to this petition are set out in detail in the section hereof entitled "How Federal Question Raised", *supra,* it is unnecessary to repeat them here.

REASONS FOR GRANTING WRIT

1. The judgment of the Court below is based on a Bill of Information which is violative of petitioner's right "to be informed of the nature and cause of the accusation," in that the statute under which it was drawn provides two separate and distinct methods of violation, incapable by their nature of combination, while the Bill of Information charges petitioner with the impossibility of being guilty of both violations at the same time.

The Statute, Louisiana Revised Statutes—LSA. R. S. 14:90, reads:

> "Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.
>
> Whoever commits the crime of gambling shall be fined not more than five hundred dollars, or imprisoned for not more than one year, or both."

The Bill of Information drawn thereunder (Tr., p. 8) reads:

> "Edward A. Haggerty, Jr., Assistant District Attorney for the Parish of Orleans, who in the name and by the authority of the said State, prosecutes, in this behalf, in proper person comes into the Criminal District Court for the Parish of Orleans, in the Parish of Orleans, and gives the said Court here to understand and be informed that one
>
> Harold F. Mills, and one Lena Vernaci, each late of the Parish of Orleans on the twenty-second day of October in the year of our Lord, one thousand nine hundred and fifty-four with force and arms in the Parish of Orleans, aforesaid, and within the jurisdiction

of the Criminal District Court for the Parish of Orleans, did commit the crime of gambling as defined by R. S. 14:90 in that each did unlawfully and intentionally conduct and directly assist in the conducting, as a business, at 1229 Simon Bolivar in the City of New Orleans, or a lottery, whereby a person risked the loss of a thing of value in order to realize a profit, contrary to the form of the statute of the State of Louisiana in such case made and provided and against the peace and dignity of the same."

"(Signed) EDWARD A. HAGGERTY, JR., Assistant District Attorney for the Parish of Orleans."

2. The first ten Amendments of the Constitution are but a reaffirmation of rights, privileges and immunities enjoyed by the people long before adoption of the Amendments, and contain no clauses restricting their effect solely to the Federal authority or contradicting Article VI of the Constitution which specifically states:

"This Constitution . . . shall be the supreme law of the land."

3. Amendment VI specifically uses the word "State" in the phrase:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the *State* and district wherein the crime shall have been committed . . ."

Applying the well established rule that criminal statutes must be strictly construed, the presence of the word "State" therein forbids, certainly as to this Amendment, any specious reasoning leading to the conclusion that it is inoperative in State courts.

4. Section 1 of Amendment XIV provides that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *Citizens of the United States* and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges and immunities of *citizens of the United States* . . ."

5. The right "to be informed of the nature of the accusation" is a right and privilege always enjoyed by and merely re-affirmed for the citizens of the United States by Amendments VI and XIV of the Constitution. (*Maxwell* and *Huartado* cases, *supra*)

> "It seems to me that the privileges and immunities enumerated in these Amendments belong to every citizen of the United States. They were universally so regarded prior to the adoption of the Fourteenth Amendment. In order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, and secure the blessings of liberty to themselves and their posterity, the political community known as the people of the United States ordained and established the Constitution of the United States; and every member of that community was a citizen of the United States. It was that community that adopted, in the mode prescribed by the Constitution, the first ten Amendments; and what they had in view by so doing was to make it certain that the privileges and immunities therein specified—the enjoyment of which, the fathers believed, were necessary in order to secure the blessings of liberty—could never be impaired or destroyed by the national government."
>
> (Justice Harlan in *Maxwell* v. *Dow*, *supra*.)

6. "Every man should be able to know with certainty when he is committing a crime", (*U. S.* v. *Reese*, 92 U. S. 214; 23 L. Ed. 563) for,

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." (*U. S.* vs. *Reese*, *supra*.)

7. Turbulent times gives rise to situations requiring, upon occasion, devious legal reasoning in order to reach a

conclusion not fraught with the possibility of widespread violent reaction. There is little doubt that the comparatively recent dreadful events preceding the adoption of the Fourteenth Amendment weighed heavily on the minds of the Court first relegating to oblivion the fact that "the privileges and immunities enumerated in these Amendments" (the first ten) "belong to every citizen of the United States" and "were universally so regarded prior to the adoption of the Fourteenth Amendment." (Justice Harlan in the *Maxwell* case, *supra*). Perhaps these memories also had some bearing on subsequent decisions, but in these modern times, remote from the painful birth of the Fourteenth Amendment, adherence to a position so untenable, historically and reasonably, can only be explained by "policy of the Court." It is suggested that "policy" is subject to change as conditions warrant. Had "policy" been unalterable, we would have no Buddhism, no Mohammedanism, no Christianity. Had "policy" remained immutable, indeed we would not have these United States of America.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Certificate

At New Orleans, Louisiana, on this 20th day of June, 1956, I, George M. Ponder, a duly commissioned Assistant Attorney General for the State of Louisiana, hereby accept service on the above and foregoing petition for Writ of Certiorari.

GEORGE M. PONDER,
Assistant Attorney General.